Supreme Court, U.S.
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No. _____

IN THE
UNITED STATES SUPREME COURT

JOSEPH A. LEVINE,
Petitioner,

v.

THE GREECE CENTRAL SCHOOL DISTRICT, MONROE-2 ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HEOFT, AMY PERITSY, AND KENNETH MERKEY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether conflicting precedents between the Circuit Courts violate the Fourteenth Amendment constitutional guarantees of due process and equal protection when some Circuit Courts divest district courts of their subject matter jurisdiction in cases involving failures to exhaust administrative remedies pursuant to the **Individuals with Disabilities Education Act** ("IDEA") [20 U.S.C. § 1400 *et seq.*] while other Circuit Courts treat such failure to exhaust administrative remedies as an affirmative defense.

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IN THE
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JOSEPH A. LEVINE,

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THE GREECE CENTRAL SCHOOL DISTRICT, MONROE 2-ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HOEFT, AMY PERITSKY, and KENNETH MERKEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph A. Levine respectfully petitions for a writ of certiorari from the United States Court of Appeals for the Second Circuit in *Joseph A. Levine v. The*

Greece Central Sch. Dist., et al., Docket No. 09-0910-cv.

OPINION BELOW

The opinion of the United Sates Court of Appeals for the Second Circuit was not selected for publication in the Federal Reporter but can be found at *Levine v. Greece Central Sch. Dist.*, et al., Slip Copy, 2009 WL 3765813 (C.A.2 (N.Y.)) (See App. at A-1).

JURISDICTION

The District Court had subject matter jurisdiction of this civil action arising under the Constitution and laws of the United States. Jurisdiction of this action was proper in the District Court pursuant to 28 U.S.C. § 1331 and § 1365. United States District Judge Michael A. Telesca in the Western

District of New York granted a motion to dismiss in a Decision and Order dated February 4, 2009. Petitioner filed a timely notice of appeal to the Second Circuit Court of Appeals on March 5, 2009.

The Second Circuit Court of Appeals had proper jurisdiction over appeals from final judgments of the District Court under 28 U.S.C. §§ 41, 1291, and 1294. A panel of the Second Circuit issued its Decision on November 12, 2009. The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution, Art. 3, Section 2, clause One, provides in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made..."

Constitution, Amendment XIV, Section One, provides in relevant part that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Individuals with Disabilities Education Act ("IDEA") , 20 U.S.C. § 1400 *et seq.*

CONCISE STATEMENT OF THE CASE

WESTERN DISTRICT OF NEW YORK

Petitioner Joseph A. Levine ("Joseph") filed a Complaint against Respondents alleging federal claims under the Individuals with Disabilities Education Act ("IDEA") [20 U.S.C. § 1400 *et seq.*], Section 504 of the Rehabilitation Act of 1973 ("Section 504") [29 U.S.C. 701 *et seq.*], the Americans with Disabilities Act ("ADA") [42 U.S.C. 12101 *et seq.*], the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and federal claims pursuant to 42 U.S.C. Section 1983.

Petitioner Joseph Levine based his claims upon the Respondents' failure to provide him with a free appropriate public

education ("FAPE"). Joseph Levine has documented processing disorders and significant sub-average intelligence. Despite these conditions, Respondents failed to implement Joseph's individualized education program ("IEP"). As a result of his disabilities, Joseph claimed that Respondents discriminated against him resulting in unwarranted suspensions, harassment, failure to provide services and repeated physical violence.

Attorneys for Respondents Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso and Kathleen Madonia ("BOCES Respondents") filed a motion to dismiss on April 1, 2008. Attorneys for Respondents Greece Central

School District, Donald Nadolinski, Deborah Hoeft, Amy Perisky, and Kenneth Merkey ("Greece CSD Respondents") filed a motion to dismiss on May 16, 2008. Both sets of respondents sought dismissal on two grounds: lack of subject matter jurisdiction under F.R.CP. 12(b)(1) and failure to state a claim under Fed.R.Civ.P. 12(b)(6). In a February 4, 2009 judgment, Federal District Court Judge Telesca of the Western District of New York granted BOCES and Greece CSD Respondents' motions to dismiss based upon a lack of subject matter jurisdiction pursuant to Fed.R.Civ.P 12(b)(1) solely because Plaintiff allegedly failed to exhaust administrative remedies. However, Judge Telesca did not address the 12 (b)(6) motion

regarding the merits of the underlying case as such action would have been an exercise of jurisdiction.

II. SECOND CIRCUIT COURT OF APPEALS AFFIRMS

Petitioner Joseph Levine appealed from the dismissal in a timely manner. In its November 12, 2009 decision, a panel of the Second Circuit Court of Appeals affirmed the judgment of the District Court asserting that "we may affirm on any basis supported by the record, including grounds not relied on by the district court." *See, e.g. Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006). In its affirmance, the Second Circuit held that "we conclude, that even if failure to exhaust administrative remedies under the IDEA does not divest the federal

courts of subject matter jurisdiction, Levine's complaint contains no allegations sufficient to demonstrate that his failure to comply with this mandatory statutory requirement should be excused."

REASON FOR GRANTING THIS PETITION:

I. POINT: CONFLICT EXISTS AMONG AND WITHIN THE CIRCUIT COURTS REGARDING WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES PURSUANT TO THE INDIVIDUALS WITH DISABILITIES ACT ("IDEA") DIVESTS DISTRICT COURTS OF SUBJECT MATTER JURISDICTION OR WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE.

A. INTRODUCTION

For children and adolescents with disabilities and their families, the IDEA is legislation of incalculable importance in its provision for their free, appropriate public education ("FAPE"). In enacting the IDEA, Congress made the finding that:

> it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.
> 20 U.S.C. §1400(c) (6).

Thus, ensuring a consistent approach amongst the Circuit Courts for the enforcement of this guarantee of public education is a matter of imperative public importance. The present conflict between and within the Circuit Courts means district courts do not have a uniform approach to exercising subject matter jurisdiction with regard to this important federally protected right.

B. "FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES" IS A JURISDICTIONAL DEFECT IN THE SECOND CIRCUIT.

This court has yet to definitively address whether a failure to exhaust administrative remedies under the IDEA completely divests a district court of subject matter jurisdiction. However, unlike the present case, one panel of the Second Circuit found that the failure to exhaust administrative remedies was jurisdictional in *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.240 (2d Cir. 2008). In stark contrast, given the opportunity to affirm a district court decision on the same basis the very next year, another Second Circuit panel in *Levine* failed to make the same definitive holding. This lack of clarity breeds differing results for similarly situated plaintiffs

throughout the country in violation of the Fourteenth Amendment's guarantees of due process and equal protection. Regardless of the underlying facts of *Levine*, the case raises an import issue regarding the subject matter jurisdiction of district courts which is "capable of repetition yet evading review." *Spencer v. Kemna*, 523 U.S.117, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

It is well-settled precedent that a plaintiff typically must exhaust all available administrative procedures before filing suit in federal court under the auspices of IDEA. *J.S. v. Attica Cent. Schools*, 386 F.3d 107, 112 (2d Cir. 2004); see 20 U.S.C. § 1415 (e)(2); A-379. Under New York State's regulations, either "[a] parent or a school

district may initiate a hearing on matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child." 8 N.Y.C.R.R. § 200.5(i)(1). The available procedures in New York State include an impartial hearing and an appeal of the hearing officer's decision to a "State review officer of the State Education Department." See 20 U.S.C. §§ 1415(f), (g); 8 N.Y.C.R.R. § 200.5(j)(1).

C. That the "Exhaustion" requirement, even in the Second Circuit is not absolute, lends credence to the point that it must not be jurisdictional.

Despite the foregoing, it is of paramount import that we emphasize that the exhaustion requirement is "not an

inflexible rule." *Mrs. W. v. Tirozzi*, 832 F.2d 748,755 (2d. 1987). Instead, Congress specified that exhaustion is not necessary if (1) it would be futile to resort to the IDEA's due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies. Id. at 756 (quoting H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)). Futility, in particular, has been found where: (1) the plaintiff would be seeking administrative relief from the same entity that failed to implement specific provisions of the student's IEP; (2) the problems alleged are "systemic violations"

that cannot be addressed by the available administrative procedures; or (3) the agency would have been unable to remedy the alleged injury at the time it occurred. *Polera v. Bd. of Ed. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488-89 (2d Cir. 2002); *J.S. v. Attica Central Schools*, 386 F.3d at 113; see also *Michaels ex. rel Michaels v. Mills*, 2004 WL 816918 ("[T]here are several exceptions to the IDEA's exhaustion requirement, including, *inter alia*, (1) futility, (2) 'an agency has failed to provide services specified in the child's individualized education program [IEP]' and (3) 'an agency has adopted a policy or pursued a practice of general applicability that is contrary to law.' ") (citing *Taylor v.*

Vt. Dep't of Ed., 313 F.3d 768, 789 (2d Cir.2002)). In the Second Circuit, the burden of proving the applicability of one of these exceptions falls on the party seeking to avoid the exhaustion requirement. *Polera*, 288 F.3d at 488, n. 8. In the present case, Plaintiff had argued, amongst other things, futility based upon systemic violations citing other cases within the school district such as *K.B. et al v. Bd. of Ed. of the Greece Central Sch. Dist.*, 05-CV-06261(DGL) (W.D.N.Y. 2007)

In addition, Congress specifically noted that there are certain situations in which it is not appropriate to require the exhaustion of IDEA administrative remedies before filing a civil lawsuit, including

complaints that "an agency has failed to provide services specified in the child's individualized educational program [IEP]." *See S.J.B. ex rel. Berkhout v. New York City Dept. of Ed.*, 2004 WL 1586500 at *5 (S.D.N.Y. 2008), citing *Polera*, 288 F.3d at 489; *Heldman v. Sobol*, 962 F.2d 148, 158 n. 11 (2d Cir. 1992) (quoting 131 Cong. Rec. 21392-93 (1985)); *see also Scaggs v. New York Dept. of Ed.*, 2007 WL 1456221 at *6, (E.D.N.Y. 2007) (failure to implement IEP is exception to exhaustion requirement).

D. Even if the Second Circuit decided that no exception applied here, its ruling nonetheless derived from the Circuit's rule that the failure to exhaust is jurisdictional and not an affirmative defense.

In the *Levine* case, the Second Circuit affirmed a decision of a district court which

had held that a family's failure to exhaust administrative remedies under the IDEA divested the federal court of subject matter jurisdiction over their case. *Levine v. Greece Central Sch. Dist., et al,* 2009 WL 3765813 (2d Cir. 2009). However, this Second Circuit chose to affirm on other grounds than did the district court thus highlighting the confusion and conflict between and within the Federal Circuit Courts of Appeal. *Id.* In *Levine*, a panel of the Second Circuit consisting of Circuit Judges Leval, Parker and Livingston side-stepped the question of whether or not the exhaustion requirement is jurisdictional. *Id. See also, Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204 (2d Cir. 2007). Dodging the subject matter

jurisdiction question, the Second Circuit stated that "whether or not the exhaustion requirement is jurisdictional, exhaustion of administrative remedies is a prerequisite to a civil suit unless the plaintiff can allege that an exception should apply." *Levine v. Greece Central Sch. Dist., et al,* 2009 WL 3765813 (2d Cir. 2009) citing *Coleman*, 503 F.3d 198, 204-205. Despite Supreme Court precedent admonishing federal courts to avoid reaching the merits on a case prior to determining their subject matter jurisdiction, the Second Circuit in the case at bar specifically addressed the merits of Joseph Levine's case without addressing subject matter jurisdiction. *See Steel Co. v. Citizens for a*

Better Env., 523 U.S. 83, 95, 118 S.Ct. 1003, 1012 (1998).

The *Levine* court relied upon *Coleman*, a case in which the Second Circuit acknowledged that "[w]e have been equivocal in our discussion of the IDEA's exhaustion requirement . . . . [b]ut we are not forced to decide whether our precedent, which labels the IDEA's exhaustion requirement as a rule affecting subject matter jurisdiction rather than an 'inflexible claim-processing' rule that may be waived or forfeited, remains good law... because there can be no claim of waiver [based on these facts]." 503 F.3d at 204-205. In *Avoletta v. City of Torrington*, 2008 WL 905882, *8 (D.Conn. 2008), the district court stated that the Second Circuit

was "yet to reach a clear conclusion" on whether failure to exhaust is a jurisdictional bar or is only an affirmative defense that is subject to waiver.

While the panel in *Levine* relied on the *Coleman* line of cases which equivocated on subject matter jurisdiction, the panel chose to completely ignore a newer contrasting precedent set only the prior year by another Second Circuit panel of judges consisting of Circuit Judges Feinberg, Calabresi and Wesley. In *Cave v. East Meadow Union Free Sch. Dist.*, this Second Circuit panel made a definitive holding that:

> [T]he district court lacked subject matter jurisdiction over appellants' federal claims because, before filing their suit, appellants failed to exhaust the administrative remedies

provided by the Individuals
with Disabilities Education Act
("IDEA").
514 F.240 (2d Cir. 2008).

In the *Cave* case, a student with hearing impairment and his parents sought an injunction against the school to allow him to bring his service dog into his high school. *Id.* In contrast to the plaintiff in *Levine*, the student received correct information about administrative review of the school district's decision to bar the service dog from the school. However, the family chose not to use this procedure. Also, in contrast to *Levine*, the student in *Cave* was reportedly receiving a wide range of special education and support services and was functioning satisfactorily under the approved IEP. In any event, *Cave* ruled definitively that the law of

the Second Circuit is that the failure to exhaust administrative remedies divests the district court of jurisdiction and is not considered an affirmative defense.

E. THERE IS AN IRRECONCILABLE CONFLICT IN THE CIRCUITS ON THE ISSUE OF WHETHER THE FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS JURISDICTIONAL.

In contrast to the Second Circuit's conflicting precedents regarding the subject matter jurisdiction issue, other U.S. Circuit Court of Appeals have definitively upheld district courts decisions finding that they lack subject matter jurisdiction in cases where the plaintiff failed to exhaust administrative remedies under the IDEA prior to filing a lawsuit. *See, e.g., M.M. v. Sch. Dist. Of Greenville County,* 303 F.3d 523 (4th Cir. 2002), *Pedroza v. Los Alamitos Sch.*

Dist., 302 Fed.Appx. 608 (9th Cir. 2008), *Ellenberg v. New Mexico Mil. Instit.*, 478 F.3d 1262 (10th Cir. 2007), *J.P. v. Cherokee County Bd. of Ed.*, 218 Fed. Appx. 911 (11th Cir. 2007).

Conversely, the Seventh Circuit reaffirmed its conclusion that the exhaustion requirement was an affirmative defense and not a complete jurisdictional bar. *Mosely v. Bd. of Ed. of City of Chicago.*, 434 F.3d 527, 532-33 (7th Cir.2006). In *Mosely*, the plaintiff alleged that her son endured a hostile environment at school as a result of his disabilities similar to the case at bar. *Mosely*, 434 F.3d at 529. School officials called the police officers and filed criminal charges against the student with disabilities.

Mrs. Mosley's son could not longer attend public school but had to finish his education through a G.E.D. program. Id. at 530. The Seventh Circuit, relying on language in *Eberhart v. United States,* 546 U.S. 12 (2005) (that courts should distinguish between jurisdictional labels to delineate classes of cases and claims-processing labels) and citing to its earlier decision in *Charlie F. v. Bd. of Ed. of Skokie Sch. Dist. 68*, 98 F.3d 989 (7th Cir.1996), concluded that the exhaustion requirement came under the claims-processing label and, therefore, it was waivable, whereas jurisdiction was not. *Mosely,* 434 F.3d at 533.

F. THE ISSUE HEREIN IS ONE OF NATIONAL IMPORTANCE IN THAT THIS COURT SHOULD GIVE GUIDANCE TO DISABLED STUDENTS.

The IDEA seeks to "ensure that educators and parents have the necessary tools to improve educational results for children with disabilities..." 20 U.S.C. 1400(d). Petitioner submits that granting this petition for certiorari would give educators and parents nationwide much-needed guidance as a Supreme Court precedent would create a consistent approach to the exercise of subject matter jurisdiction in cases involving education for children with disabilities. This issue is also of paramount importance in the proper administration of the federal courts within their constitutional framework as an "appellate federal court must satisfy itself not only of its own jurisdiction, but also that

of lower courts in cause under review."

Mitchell v. Maurer, 55 S.Ct. 162 (1934).

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: Rochester, New York

February 9, 2010

Respectfully submitted,

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APPENDIX A

HOnly the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.
Joseph A. **LEVINE**, Plaintiff-Appellant,
v.
GREECE CENTRAL SCHOOL DISTRICT, Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso, Kathleen Madonia, Donald Nadolinski, Deborah Hoeft, Amy Peritsky, and Kenneth Merkey, Defendants-Appellees.
No. 09-0910-cv.

Nov. 12, 2009.

Background: Student brought action against school district defendants and Board of Cooperative Educational Services (BOCES) defendants for violations of the Individuals with Disabilities Education Act (IDEA), in relation to injuries he suffered while a student, and for defendants' alleged failure to provide him with a free appropriate public education (FAPE). The United States District Court for the Western District of New York, Telesca, J., 2009 WL 261470, dismissed for lack of subject matter jurisdiction. Student appealed.

Holding: The Court of Appeals held that student failed to exhaust administrative remedies under the IDEA.

Affirmed.

West Headnotes

Schools 345 ⚿0

345 Schools

Allegation that a school district official told student's parents, in response to father's statement that he thought an impartial hearing was needed, that there was not a need to hold such a meeting, and that the school district would get student the help he needed, was insufficient to support estopping school district defendants from asserting an exhaustion defense in student's action alleging violations of the Individuals

with Disabilities Education Act (IDEA), in relation to injuries he suffered while a student, and for defendants' alleged failure to provide him with a free appropriate public education (FAPE); student filed a complaint with the New York State Education Department (SED) after official made the statement, showing that student's parents did not rely on the official's statement that the district would provide the student the

help needed. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

Appeal from a judgment of the United States District Court for the Western District of New York (Telesca, J.).Jeffrey Wicks, Law Office of Jeffrey Wicks (Seth T. Molisani, on the brief), Rochester, N.Y., for Plaintiff-Appellant.

Dale A. Worrall, Harris Beach LLP, Pittsford, N.Y., for Defendants-Appellees Greece Central School District, Donald Nadolinski, Deborah Hoeft, Amy Peritsky, and Kenneth Merkey.

Michael S. Cerrone, Webster Szanyi LLP, Buffalo, N.Y., for Defendants-Appellees Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso, Kathleen Madonia.

Present PIERRE N. LEVAL, BARRINGTON D. PARKER and DEBRA ANN LIVINGSTON, Circuit Judges.

APPENDIX A

SUMMARY ORDER

*1 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED.

Plaintiff-Appellant Joseph A. Levine ("Levine") appeals from a judgment of the United States District Court for the Western District of New York (Telesca, J.) entered on February 4, 2009 granting the motions to dismiss of Defendants-Appellees Greece Central School District ("GCSD"), Donald Nadolinski, Deborah Hoeft, Amy Peritsky, and Kenneth Merkey (collectively "District Defendants") and Monroe 2-Orleans Board of Cooperative Educational Services("BOCES"), David Mancuso, and Kathleen Madonia (collectively "BOCES Defendants"). Levine brought suit against Defendants-Appellees for violations of the Individuals with Disabilities Education Act (IDEA), § 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983, in relation to injuries he suffered while a student at GCSD and BOCES from 2005 until 2007, and for Defendants-Appellees' alleged failure to provide him with a free

appropriate public education (FAPE) as required by the IDEA. The district court dismissed Levine's complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) because Levine had failed to exhaust his administrative remedies as required by the IDEA and did not sufficiently allege that any exception to the exhaustion requirement applied. We assume the parties' familiarity with the underlying facts, procedural history, and specification of the issues on appeal.

We review a district court's grant of a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) de novo for conclusions of law; we must also accept the facts alleged in the complaint as true. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir.2006). We may affirm on any basis supported by the record, including grounds not relied on by the district court. *See, e.g., Thyroff v. Nationwide Mut. Ins. Co.* ., 460 F.3d 400, 405 (2d Cir.2006).

A. The IDEA's Exhaustion Requirement

"It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in

federal or state court." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112 (2d Cir.2004). This administrative process "includes review by an impartial due process hearing officer and an appeal from that hearing." *Id.* (citing 20 U.S.C. § 1415(f), (g)). A party who, under other federal statutes, seeks relief that is also available under the IDEA must satisfy the IDEA's exhaustion requirements. *See id.* at 116; 20 U.S.C. § 1415(l).

There is no dispute that Levine did not exhaust the administrative remedies available to him and required by the IDEA. The parties do dispute whether the IDEA's exhaustion requirement is jurisdictional-that is, whether failure to exhaust administrative remedies prevents a federal court from exercising subject matter jurisdiction over the claim, or whether failure to exhaust is merely an affirmative defense that must be raised by the defendant or else is subject to waiver or forfeiture. Whether or not the exhaustion requirement is jurisdictional, exhaustion of administrative remedies is a prerequisite to a civil suit unless the plaintiff can allege that an exception should apply. *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204-05 (2d Cir.2007). We need not address whether it is jurisdictional. Both sets of defendants raised

the exhaustion issue before the district court. *See* id. at 204 (declining to decide whether the IDEA exhaustion requirement is jurisdictional as the defendants did not waive the argument that plaintiff had not exhausted remedies).

*2 Levine argues that, if exhaustion of administrative remedies is merely an affirmative defense, it was premature for Defendants to assert it in a pre-answer motion to dismiss and thus it was waived. We disagree, because the complaint concedes that Levine failed to exhaust administrative remedies. Under those circumstances, when the complaint on its face shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that the plaintiff satisfied the exhaustion requirement, failure to exhaust is a proper ground for a motion to dismiss. *See* Mosely v. Bd. of Educ., 434 F.3d 527, 533 (7th Cir.2006) (describing this "short-cut"); *cf.* United States v. Moreno-Rivera, 472 F.3d 49, 50 n. 2 (2d Cir.2006) (per curiam) (noting that government's objection to the timeliness of appeal could be asserted in motion to dismiss appeal).

B. Equitable Estoppel

Levine further argues that Defendants should be estopped from asserting an exhaustion defense because Defendants made misrepresentations to Levine's parents regarding the necessity of administrative remedies. The complaint alleges that in late 2005, a GCSD official, Defendant Kenneth Merkey, told the Levines, in response to Mr. Levine's statement that he thought an impartial hearing was needed, that "there was not a need to hold such a meeting; further ... that they (GCSD) will get Joseph the help he needs." Compl. ¶ 63. The complaint further alleges that this statement "induced Mr. Levine not to take action on behalf of Joseph ... [and] discouraged Mr. Levine

from exhausting administrative remedies." *Id.* ¶ 64. We note that the complaint alleges nothing that would support an estoppel argument against the BOCES Defendants; therefore this argument is inapplicable to them.

Assuming the facts alleged are true, they do not support an equitable estoppel argument. The complaint alleges that Merkey made his statement to Levine in "late 2005." Compl. ¶ 33. However, many of the complaint's allegations center around conduct of Defendants that took place in 2006 and 2007. *See, e.g., id.* ¶¶ 24, 31-49, 66-69. Moreover,

the complaint discloses that Levine filed a complaint with the New York State Education Department (SED) in March, 2006. *Id.* ¶ 58. The SED complaint shows that the Levines did not rely on Merkey's statement that GCSD would provide Joseph the help needed. Moreover, to support an equitable estoppel argument, a party must show that its detrimental reliance was reasonable under the circumstances. *See Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 447 (2d Cir.2006). The complaint alleges that conditions for Levine did not improve after late 2005 and that the district continued to fail to provide him a FAPE. Compl. ¶ 73. The complaint alleges no facts that would indicate that, under these circumstances, the Levines' continued reliance on Merkey's statement was reasonable. We conclude that the District Defendants are not estopped from arguing that Levine failed to exhaust administrative remedies.

C. Futility

*3 Levine argues that he should be excused from satisfying the IDEA's exhaustion requirements on the ground that it would have been futile for him to resort to the available administrative remedies. A plaintiff is excused from the IDEA's

exhaustion requirement if he proves that "it would be futile to resort to the IDEA's due process procedures." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir.2002). "[A] plaintiff must demonstrate that 'adequate remedies are not reasonably available,' " *Coleman*, 503 F.3d at 205 (quoting *J.G. by Mrs. G. v. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir.1987)), "or that 'the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process.' " *Id.* (quoting *Heldman v. Sobol*, 962 F.2d 148, 158 (2d Cir.1992)). The party seeking to be excused from the exhaustion requirement bears the burden burden of proving futility. *Polera v. Bd. of Educ.*, 288 F.3d 478, 488 n. 8 (2d Cir .2002).

None of the grounds for futility asserted by Levine are supported by the complaint. First, Levine argues that Merkey's statement to his parents constituted action by the defendants that caused the Levines not to exhaust the available administrative remedies. Although we have suggested that parents who are denied the opportunity by the school district to pursue administrative remedies are not subject to the IDEA's exhaustion requirement, *see, e.g., J .G.*, 830 F.2d at 447, the complaint here alleges nothing to suggest that Defendants took any action that prevented the Levines from

seeking an impartial hearing. Moreover, it is undisputed that the Levines received Procedural Safeguards Notices from the District informing them of the availability of such remedies. Compl. ¶¶ 61-62. For the same reasons that Merkey's statement does not estop the District Defendants from asserting a failure-to-exhaust argument, we conclude that the statement also does not amount to an action that prevented the Levines from seeking further review in late 2005 when it was made, or at any point thereafter.

Second, Levine argues that he should be excused from exhausting administrative remedies because the Defendants failed to implement the provisions of his Individualized Education Program (IEP). The complaint, however, alleges that not only did Defendants fail to implement Levine's IEP, Compl. ¶¶ 55, 59-60, but also that Levine's existing IEP was not "appropriate," *id.* ¶¶ 55, 60, and that Defendants failed in various other ways to provide Levine with a FAPE. Our cases that have allowed plaintiffs to avoid the exhaustion requirement due to a school district's failure to implement a student's IEP have done so only in narrow situations in which the plaintiff's claim is limited to the allegation that "a school has failed to implement services that were specified or

otherwise clearly stated in an IEP." *Polera*, 288 F.3d at 489; *see also SJB ex rel. Berkhout v. N.Y. City Dep't of Educ.*, No. 03 Civ. 6653, 2004 WL 1586500, at *5 (S.D.N.Y. July 14, 2004). The complaint's allegations are clearly far broader than the Defendants' failure to implement specific concrete requirements of an IEP, and therefore do not support the argument that it would have been futile for Levine to seek administrative remedies for Defendants' alleged conduct.

*4 Finally, Levine argues that because the problems at GCSD and BOCES were "systemic," failure to exhaust administrative remedies would be futile because such remedies would not be able to solve the larger problems with the way GCSD and BOCES deal with students with special needs. The basis for this argument is that GCSD was the defendant in a class action law suit, *K.B. et al. v. Board of Education of the Greece Central School District*, which alleged that GCSD failed to provide FAPEs to "students requiring special education services." Compl. ¶ 65. The class action was settled in August, 2007. *Id.* We have, however, only allowed a plaintiff to be excused from the exhaustion requirement when the plaintiff challenges conduct that administrative remedies, which focus on the individual needs of particular students, have "no power to correct." *J.S.*, 386 F.3d at 113. These are cases involving "the framework

and procedures for assessing and placing students in appropriate educational programs" or which involve a high volume of complaints challenging general practices by defendants that allegedly violate the IDEA. *Id.* at 114;*see also id.* at 113-14 (collecting cases). Because, as the district court noted, it is clear from the complaint that Levine is challenging the Defendants' treatment of him individually, and does not make allegations other than in conclusory fashion that his situation resulted from systemic violations of the IDEA, *see* Compl. ¶ 65, we conclude that it would not have been futile for him to resort to administrative remedies.

D. Conclusion

We conclude that, even if failure to exhaust administrative remedies under the IDEA does not divest the federal courts of subject matter jurisdiction, Levine's complaint contains no allegations sufficient to demonstrate that his failure to comply with this mandatory statutory requirement should be excused. We have considered Levine's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

APPENDIX A

C.A.2 (N.Y.),2009.

Levine v. Greece Cent. School Dist.

Slip Copy, 2009 WL 3765813 (C.A.2 (N.Y.))